ICCA

CONGRESS SERIES NO. 22

INTERNATIONAL ARBITRATION CONGRESS
HONG KONG, 5-8 MAY 2024

Wolters Kluwer

INTERNATIONAL COUNCIL
FOR COMMERCIAL ARBITRATION

International Arbitration:
A Human Endeavour

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with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
920 Links Avenue
Landisville, PA 17538
United States of America
E-mail: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-3209-7

e-Book: ISBN 978-94-035-3219-6
web-PDF: ISBN 978-94-035-3229-5

Printed in the Netherlands.

Preface

We chose 'International Arbitration: A Human Endeavour' as the theme of the XXVII ICCA Congress in order to examine the importance of people in the arbitration process and to reflect on how that might change. The theme was both a statement and a question.

That theme was especially apposite in Hong Kong, a city that epitomises human enterprise, international commerce and the meeting of East and West cultural traditions.

We wanted to recognise some of the notable influencers that have shaped international arbitration as we practise it today. Dr Bryant Garth, the co-author of the landmark sociological study on the development of international arbitration, 'Dealing in Virtue', was the keynote speaker on the first day. We also acknowledged Dr Pieter Sanders, the uber-visionary, by showing an interview of him talking about his trip to New York and his 'Dutch proposal' that became the 1958 Convention. Later in the Congress, we honoured Dr Albert Jan van den Berg, who has done so much to promote international arbitration and support ICCA.

The first day focused on 'The Arbitrator': what it means to be an arbitral decision-maker. The sub-topics included: is judging and arbitrating the same; what extraneous factors most influence arbitrators; is there an ideal personality type for an arbitrator; what is expected of an arbitrator by users; and to what extent does it matter to have a person rather than a machine decide disputes? The answer to that last question was enlightening: a number of people thought that presenting their client's case to a human decision-maker was essential to the feeling that justice had been done. And that experience, intuition and wisdom were invaluable, albeit sometimes fallible, qualities.

We also considered how people make decisions and the influences of: biases (in the sense of a person's background), with an explanation of what happens in the brain when we make decisions; sociology and education; and culture, localisation and regionalism.

Informing about the New York Convention is a key aspect of ICCA's mission. At the Congress, we launched the 2nd Edition of ICCA's Guide to the Interpretation of the

Convention, in English and also a translation into Chinese. Consistent with the overall theme, we also examined the consistency of decisions by human judges and their consideration of societal factors in the application of public policy.

The second day focused on 'The Advocate': what makes an effective advocate; what does the science of the human brain tell us about how persuasion works; and what tools or innovations can advocates draw upon? We also explored how procedure can impact the conduct of different participants in the dispute resolution process. And how much does the language used in an arbitration shape the process and influence the outcomes (this was a recurring question).

When humans are involved, inevitably, issues of behaviour arise. We looked at inter-personal conduct and ethics with a panel discussing ICCA's recent Guidelines on Standards of Practice in International Arbitration as they relate to our roles as advocates, arbitrators, experts, witnesses, and administrators, taking into account differing cultural perspectives and legal traditions. Arbitration is almost always confrontational, and we explored (inspired by the concept of 'doughnut economics'): the pressures on advocates (including junior lawyers in the team); the tension of cross-examination; how to optimise expert witness engagement; and practical psychology tips to help survive and thrive in adversarial environments.

ICCA's mission includes encouraging conciliation. We had a panel that described current initiatives tackling climate change and its impact on communities, practical experiences of designing rules for state-to-state and multi-stakeholder conflicts, and dispute resolution innovation addressing societal inequalities.

On the third day, we turned to 'International Arbitration: An AI Endeavour' and asked the question whether the incremental adoption of artificial intelligence across society, including in the delivery of justice, might shape assumptions not only of what is permissible but of how arbitration should be conducted. AI will impact advocacy and decision-making, access and transparency, and the skill sets needed by participants. Panellists discussed the impact this will have on the legitimacy of international arbitration.

Professor Richard Susskind, a global expert on AI's impact on the legal profession and author of *Tomorrow's Lawyers*, gave the closing keynote. His optimistic and cautionary outlook was that clients will still want the star-gladiators to represent them in important disputes, before the best human arbitrators.

We are very pleased that the theme, and the sub-topics, resonated with so many people. The history of arbitration and the impact of influencers, the human arbitrator, the human advocate, inter-personal conduct, and the challenges and opportunities of AI are of universal interest.

The Congress confirmed that international arbitration undoubtedly remains, at present, a human endeavour.

We are extremely grateful to ICCA for the opportunity to curate a Congress on a subject which we are both hugely invested in: what does it mean to dispense arbitral justice.

We are also grateful to the three hundred people who submitted expressions of interest asking to speak, we are sorry that we had to be selective, and to the Programme Committee for their assistance in framing the programme.

Mostly, we are grateful to all the speakers for their time and insights, many of which are included in this book.

Chiann Bao and Audley Sheppard KC
Programme Co-Chairs

XXVII ICCA CONGRESS

12-15 April 2026

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‘International Arbitration: Local, Global or Both?’

For programme and registration information:

https://icca2026.es/
www.arbitration-icca.org

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Improving the Utility of Fact Witness Statements for Arbitral Tribunals: Tell It as It Is, Not How It Should Be

*Brandon Bang**

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I INTRODUCTION

In every submission made in the arbitral process, the perennial question that vexes an advocate is this: *what is the tribunal's view of my client's case?* Effective persuasion in international arbitration is as much about presenting a compelling case as it is about 'understanding what arbitrators feel and know, what they believe, and then providing them with messages consistent with these predispositions'.[1]

In this sense, it is hard to take issue with the proposition enshrined in Guideline IV.B of the ICCA Guidelines on Standards of Practice in International Arbitration (the *ICCA Guideline*) – that '[e]xpert and fact witnesses shall assist the arbitral tribunal and follow its directions' (*Guideline IV.B*) – not least because assisting the tribunal should arguably be the goal of every party to the arbitration.

However, does Guideline IV.B potentially limit the party's freedom to present its case and design a procedure that it believes will maximize the chances of winning? In

* Partner (Senior Foreign Attorney), Shin & Kim LLC, Seoul, Korea.
1. Donald E. Vinson and Klaus Reichert, *Arbitration: The Art & Science of Persuasion* (Oxford University Press 2022), p. 8.

this chapter, I explore the limits of one of the principles underlying the guideline, namely, that tribunals have an overriding authority to dictate the procedure, which may in turn, predetermine the type of evidence they prefer, based on their preconceived notion of what they believe to be 'good' evidence.

I propose to undertake two broad lines of inquiry, focusing on fact witness evidence. *First*, what counts as 'good' evidence? I tackle this question by reference to the English court reforms that have been adopted to improve the effectiveness of fact witness statements for English court proceedings (*section II*). *Second*, what tools and procedures can be adopted to produce more 'good' evidence in arbitral proceedings? Here, I explore whether certain English court reforms could be applied in international arbitration (section III). Then I conclude (section IV).

II WHAT IS AT THE CORE OF 'GOOD' FACT WITNESS EVIDENCE?

1 Adapting English Court Reforms on Fact Witness Statements to International Arbitration

Witness statements take centre stage in almost every arbitration proceeding. Evidence of fact produced by the parties enable the tribunal to perform its fact-finding function.[2] In modern international arbitration, witnesses are produced not merely to prove disputed facts. Rather, witnesses are deployed for a variety of purposes – to tell a party's story on a more personal level, to explain the context of documents exchanged in a business transaction, to appeal to the tribunal's sense of fairness, or sometimes simply because the other party has produced a witness.

However, there is growing frustration that fact witness statements are not being deployed in a manner that is helpful for the tribunal.[3] The root cause appears to be that counsel, rather than witnesses, often take ownership of the entire drafting process. This is sometimes inevitable in high-stakes litigation, which demands perfectionism and complete control. The control of witnesses and what they produce is merely one facet of this process. Thus, while we complain, we have become numb to the experience: 100-page witness statements supported by 100 documentary exhibits, prose plucked out of legal submissions (with a change of pronouns to the first-person), and parlance more fitting for counsel's chambers than for canteens at a construction site.

There have been many calls for reform. Nearly 25 years ago, the late V. V. Veeder QC in his seminal 2001 Goff Lecture observed 'an increasing tendency for a factual witness statement to take the form of special pleading prepared substantially by lawyers, … [which] diminishes the statement's probative value and increases the need

2. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (© Kluwer Law International, 7th edn, Oxford University Press 2023,), para. 6.124.
3. Julian Bickmann, *Fact-Finding in International Arbitration: The Emergence of a Transnational Lex Evidentiae* (© Kluwer Law International, Kluwer Law International 2022), para. 3.66.

for oral cross-examination'.[4] The same observation was made almost a decade later by Toby Landau KC in his 2010 Kaplan Lecture, that counsel-led drafting process results in statements that 'are often detailed and lengthy documents, which are costly to produce'.[5]

More recently, Professor Doug Jones has similarly observed that modern witness statements are over-lawyered.[6] He has been a proponent of a procedure that draws inspiration from the reforms introduced in the Business and Property Courts of England and Wales in 2021 (Civil Procedure Rules 1998 (U.K.), Practice Direction 57AC),[7] which is essentially for a return of witness statements to their original and, arguably, purest form as 'a short and curt recitation of a factual witness' memory of the events'[8] in the spirit of the now largely defunct practice in the common law courts where evidence-in-chief was taken orally.

Professor Jones proposes that procedural orders should reflect the following principles in relation to fact witness statements:

(i) subject to providing background context, the witness statement must only contain matters relevant to the issues in dispute of which the witness has personal knowledge;
(ii) the witness statement must not contain any supposition, speculation, conjecture, or commentary on another person's knowledge;
(iii) the witness statement must not contain any argument;
(iv) there should not be a recitation of the documentary record, or quotations from contemporaneous documents;
(v) witnesses should only refer to documents which they had received or were aware of before the dispute arose, and only if it is necessary to refer to the document; and
(vi) the witness statement should identify where documents have been used to refresh the witness's memory (whether those documents have been referred to or not in the witness statement).[9]

The basic aim for the proposal is to produce a witness statement that is shorter, based on what the witness can recall from what he or she has 'seen, heard, touched, or otherwise perceived'.[10] In essence, the witness should convey his or her side of the

4. V.V. Veeder QC, 'The Lawyer's Duty to Arbitrate in Good Faith' (The 2001 Goff Lecture) in Sam Wordsworth KC and Marie Veeder (eds), *On Arbitration: V.V. Veeder QC, Selected Writings and Contributions to the Development of Law* (Oxford University Press 2023), p. 215.
5. Toby Landau KC, *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration* (The Kaplan Lecture, The Hong Kong Club 17 November 2010,), p. 5.
6. Doug Jones and Robert Turnbull, 'Witness Statements and Memorials: Reforms to Serve Parties, Arbitrators, and Arbitrations', *Journal of the American College of Construction Lawyers*, Vol. 18, No. 1, 2024, p. 65.
7. The Working Group cites to the same problem as the main driver for reform, which is especially 'endemic in the litigation of well-funded, document-heavy, business disputes': *see* Implementation Report of the Witness Evidence Working Group, 'Factual Evidence in Trials Before the Business & Property Courts', July 2020, para. 10.
8. Doug Jones and Robert Turnbull, 'Memorials and Witness Statements: The Need for Reform', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 88, No. 3, 2022, p. 339 https://doi.org/10.54648/amdm2022024 (accessed 16 August 2025).
9. Jones and Turnbull (n 6) p. 70.
10. *Ibid*., p. 66.

story in his or her own words, which cannot be obtained from the documents; where one needs to refer to documents, these can be incorporated in a memorial-style submission rather than cited (or recited) in the witness statements.[11]

Will such an approach help to improve the effectiveness of fact witness statements? This question is addressed below.

a *Can We Trust Our Own Memory?*

Who dislikes shorter witness statements? Especially ones without exhibits? Yet the belief that humans are a reliable conduit of their own experiences needs to be challenged. Human memory is fallible and recent scientific studies back this up.

The ICC Commission established a Task Force to look into the science behind the fallibility of human memory and evaluate the effect of memory on the value of witness evidence. In 2020, the Task Force issued a report (the *ICC Report*),[12] which draws attention to findings showing that even the memory of an honest witness is imperfect and malleable, and thus, subject to alteration or contamination by distorting influences as soon as it is formed.

What is concerning is that these external influences – referred to in the report as ‘post event information’ – come from interactions that are perfectly innocent and commonplace in a modern corporate environment we take for granted, such as ‘[t]alking to co-witnesses after an event, viewing media reports, or retelling an experience to friends or officials’.[13]

In particular, the ICC Report cites several studies that found, among other things, that certain wording, such as qualifying descriptors in questions, can materially influence the answers. For example, in one study, participants responding to the question ‘Do you get headaches *frequently*?’ tended to report an average of 2.2 headaches per week, whereas the question ‘Do you get headaches *occasionally*?’ generated reports of far lower average of only 0.7 headaches per week.[14] Lesson for arbitration? Interviews conducted by in-house or external counsel can have a profound impact on how witnesses recall their memory in preparing witness statements.

In another study, co-participants, who each viewed slightly different versions of the same film and consequently discussed the conflicting details they had noted, would often report details they had not seen on the memory test. The risk of such ‘misinformation effect’ is high in international arbitration, where disputes involve multiple persons with knowledge of the relevant events, many of whom work in teams, interact with each other as co-workers and are often interviewed together as potential witnesses by counsel.[15]

11. *Ibid.*, pp. 68-69.
12. ICC Commission Report, The Accuracy of Fact Witness Memory in International Arbitration: Current Issues and Possible Solutions (2020), para. 1.33.
13. *Ibid.*, para. 2.4.
14. *Ibid.*, para. 2.11.
15. *Ibid.*, para. 2.17. The “misinformation effect” refers to “a phenomenon where typically misleading information which participants are exposed to after an event interferes with or impairs their original memory of that event”: *Ibid.*, para. 2.13.

What do the studies identified by the Task Force tell us, as counsel and arbitrators, about the reliability of witnesses' recollection?

First, whilst we can take pride in the fact that the modern system of international arbitration has evolved to a (relatively) predictable way of resolving cross-border disputes through standardized procedures, as Toby Landau KC noted in his Kaplan Lecture in 2010, we need to acknowledge that the preparation and presentation of witness evidence has received little scrutiny and 'developed without any regard for what is a very substantial body of scientific research on the operation of human memory'.[16]

Second, when witness statements rely heavily on witnesses' recollection, great care is needed to minimize distortion of their original memory. Professor Jones' sixth principle – that the witness should identify where documents have been used to refresh his or her memory – aims to reduce this risk by making transparent the process in which the witness' account has been incorporated into a witness statement. This appears to be an attempt to discourage the practice of showing witnesses swathes of documents, of which they have no first-hand or contemporaneous knowledge. The intended outcome is to limit the areas in which factual witness evidence is required and encourage the use of documents alone to support a factual narrative where possible.

These same concerns about voluminous documentary record have given rise to one of the more drastic requirements in the recently introduced Practice Direction 57AC (*PD 57AC*) in English court procedures, namely, that a witness statement submitted in English courts must identify *by list* any documents the witness has referred to, or been referred to, for the purpose of providing his or her witness statement.[17] The Witness Evidence Working Group[18] observed that because human memory can be 'complex, fragile and malleable', the process of treating the witness' recollection must be approached with caution, which the document-listing requirement is intended to address.[19] The question of whether the same requirement should be applied in international arbitration is discussed in *section 2* below.

Third, the fallibility of witnesses' recollection does not mean that documentary evidence is always more reliable than witness evidence. Text in a document can be misleading or ambiguous.[20] For example, minutes of meetings may simply reflect the author's subjective perception of events, which other participants in the meeting were unable to review.[21] In these circumstances, the tribunal may benefit from hearing directly from the witness to explain his or her account of the surrounding context to the document in question.

With this in mind, I now take a more critical look at whether the recent English court reforms would in fact be effective in removing the vices of modern witness

16. Landau (n 5) p. 2.
17. PD 57AC, para. 3.2.
18. A group comprising judges, barristers and solicitors working in the Business and Property Courts of England and Wales and a nominee representing lay client users, that had worked on the development of PD 57AC.
19. Implementation Report of the Witness Evidence Working Group (n 7) para. 43.
20. ICC Report (n 12) para. 4.16.
21. *Ibid*., para. 6.13.

statements, or whether a more nuanced approach is required for international arbitration.

2 Are the English Court Reforms Appropriate for International Arbitration?

The starting point for analysis is Professor Jones' six principles, which were inspired by the English court reforms in PD 57AC and which he has already put into practice in arbitration cases. I consider each in turn.

a First Principle: Subject to Providing Background Context, the Witness Statement Must Only Contain Matters Relevant to the Issues in Dispute of Which the Witness Has Personal Knowledge

This principle should garner little to no objection. There is however a nuanced point that is worth noting.

Witnesses come with differing degrees of personal knowledge of relevant events. This may be due to the witness' role within a company or on a project at the time. For example, a project director who assumes an overall managerial role over a project may not have personal knowledge of the particular defect that was discovered on the ground, but would have become aware of it through the reporting line within the project management team. In a complex construction dispute where it is an important element of the claim to establish that the counterparty's breaches were the result of poor management of the project, it may be helpful for the tribunal to understand how the project was managed from a project director's perspective.

In that context, the project director should be able to give evidence on events even if he or she does not have direct knowledge of the same. Such evidence is often critical in understanding how complex projects were performed, especially if the project has been in delay for many years, and a bird's-eye view of the dispute (from a project director's perspective) can help the tribunal to connect the dots between the more specific evidence from other witnesses (who were closer to the claim events). Neither the case nor any particular claim may turn on such evidence, but parties should be entitled to adduce such evidence if they believe doing so would enhance the tribunal's understanding of the claim.

b Second Principle: The Witness Statement Must Not Contain Any Supposition, Speculation, Conjecture, or Commentary on Another Person's Knowledge

This principle could be understood as a bar to providing one's views or opinions, which generally falls within the province of expert witnesses. This principle should be applicable in almost all cases, but more so where the dispute has aged through the passage of time and is not well documented, as was the case in the recent case of *The*

Federal Republic of Nigeria v. Process & Industrial Developments Limited.[22] There, Knowles J noted that he found cross-examination that invited the witnesses' 'views', as opposed to 'their recollection or claimed recollection' of lesser evidentiary value.[23]

There are however cases in the margins where commenting on another person's knowledge may be helpful, if not necessary, to establish the full picture of a particular story. For instance, in cases where there is a debate as to what was discussed and the meaning of certain statements made at a meeting, there is no reason why one witness should be prevented from commenting on whether he or she believes the other witness' account of the discussion is true. One can imagine a situation where an opposing party's witness, given his or her seniority, was known by all personnel involved to have no direct experience of the matters discussed at a meeting (which discussion is subsequently memorialized in a document). Here, a party should be entitled to produce a witness to comment on the opposing party's witness' knowledge, even if the witness did not participate at the meeting, if he or she is aware that the opposing party's witness lacks direct knowledge of the relevant events and is therefore not in a position to provide a direct account of the discussions that took place at the meeting.

The above example illustrates that documents are not *inherently* more probative evidence: it depends on the way in which the document was produced. Indeed, the commonly accepted belief that documentary evidence is superior than oral witness evidence is being shaken by the rapidly changing definition of what a document actually is. Modern business is increasingly, if not predominantly, conducted through social messaging applications where the risk of equivocation is much higher than in e-mails or letters, as message-driven communication rely heavily on idiosyncratic language or private lexicon developed by the parties involved – in other words, what one sees in an exchange of messages may be mere fragments of the larger unspoken mapping of understandings and concepts, where parties were able to say things to mend working relationships in the interest of the project without the fear of contractual repercussions. To have such statements weaponized as documentary evidence against the author of the statements is to disregard the reality of what the parties had intended at the time. In these situations, witness evidence that can at least explain the context of the messages, such as what the counterparty's witness' knowledge was at the time, is critical to determining whether the messages are in fact reliable evidence for the proposition they are produced to support.

The alternative would be for counsel to explain how the messages should be interpreted, which may risk counsel giving evidence from the bar.

22. *The Federal Republic of Nigeria v. Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm). The case is well known and its facts are not repeated here, but the court's task was to determine whether the award subject to a setting aside challenge (worth around USD 11 billion) was obtained by fraud or was against public policy under section 68(2)(g) of the Arbitration Act 1996.
23. *Ibid.*, para. 19 (though it must be said that Knowles J made this remark with "no lack of respect" to the "rigorous" examination conducted by counsel given how challenging of a task it was in that case).

c Third Principle: The Witness Statement Must Not Contain Any Arguments

It is important to be more precise about what an 'argument' is. It is trite that any legal and factual conclusions to be drawn from the evidence fall within the domain of counsel.

However, there may be situations where 'argumentative' evidence may be needed, if not expected. For example, where the attack is personal and goes to issues of dishonesty, it is far more credible for the witness, rather than counsel, to respond directly in the witness' own words that may be argumentative in substance, structure and tone.

d Fourth Principle: There Should Not Be a Recitation of the Documentary Record, or Quotations from Contemporaneous Documents

As with the first and second principle, this principle should be applied flexibly. Impractical outcomes may result otherwise.

As a general matter, court proceedings for complex and large disputes can stretch out for weeks or even months. Arbitration hearings are considerably shorter. Long oral openings that take several days or more are not uncommon in common law-style litigation, but they are rare in arbitration, even for the most complex disputes. Thus, there is less time for counsel to take the tribunal through important documents in oral openings, which often means witness statements must bear the burden of incorporating documents so that key documents can be put to the tribunal during witness examinations. Tribunals willing to sit longer hours to go through the documents in openings and closings may be one solution, but generally there should be flexibility in how documents should be deployed in witness statements.

e Fifth Principle: Witnesses Should Only Refer to Documents Which They Had Received or Were Aware of Before the Dispute Arose, and Only If It Is Necessary to Refer to the Document

Every counsel should ensure that witnesses strive to comply with this principle. Witnesses trying to 'own' documents of which they have no contemporaneous authorship or knowledge is a serious vice that reduces the effectiveness of witness statements. It enlarges the scope for cross-examination and wastes precious hearing time.

f Sixth Principle: The Witness Statement Should Identify Where Documents Have Been Used to Refresh the Witness' Memory (Whether Those Documents Have Been Referred to or Not in the Witness Statement)

As discussed above, this principle closely resembles one of the more controversial requirements introduced in PD 57AC. The requirement was only introduced by a majority and not a full consensus. It is therefore worth recounting the reasons for and against the requirement to see whether the requirement can be applied to international arbitration.

The core argument in favour of the listing requirement is that it would enhance transparency of the process of how witness statements have been prepared. It is desirable for the court to know up front if the witnesses have been subjected to an unreliable means to provide their recollections that end up in their witness statements. For example, witnesses may be shown documents they did not see when the relevant event occurred, and this would amount to leading the witness that can influence what is ultimately presented as their testimony; it is important that the court is made aware that this has or may have occurred.[24]

The main view against the listing requirement is that it will not achieve its intended effect because there is a possibility of adverse inferences being drawn if it is known through a list that witnesses have been shown large numbers of documents. The main concern is that there will be a chilling effect: witnesses may not be shown relevant documents at all during preparation of their statements to avoid documents from being listed, and such an internal culling exercise will eventually add to overall costs.[25] There is also a practical concern: in certain cases where the witness is also a client or the witness has 'lived with' the dispute for many years, it will be substantially difficult to identify the relevant documents.[26]

In my view, if witness statements are to become shorter and more focused, greater transparency of the documents that the witness has been referred to by counsel during preparations is desirable. I put forward four reasons.

First, given the fallibility of human recollection, it is essential that tribunals are aware of the process through which the witness has given input that has become their testimony in the arbitration.

Second, the listing requirement can promote more effective cross-examinations. First, the list can be used by counsel to discipline the witness if the witness seeks to provide commentary on documents it has neither referred to nor seen. Second, and arguably, the real purpose of cross-examination is not to test whether the witness has recalled an event correctly (in which case counsel can do no better than elicit the response that 'that is how I remember it', which is not helpful for the tribunal) but to 'subject the documentary record to critical scrutiny and to gauge the personality,

24. Implementation Report of the Witness Evidence Working Group (n 7) paras 42-44.
25. *Ibid.*, paras 48-50.
26. *Ibid.*, para. 53.

motivations and working practices of a witness'.[27] This must be right, because, as the Witness Evidence Working Group recognized, 'the important parts of a factual witness's testimony will be those parts that are not covered, or are incompletely covered, by the documentary evidence, together with any parts that appear to conflict with the documentary evidence'.[28]

Third, the list can help to discipline counsel in hearings. In particular, counsel in either cross-examination or redirect examination would give second thought to asking questions on documents that the witness is not familiar with. The problem, in my view, is more acute during redirect examination, where a well-battered witness after cross-examination would be inclined to self-correct what he or she has said, often through counsel who would also be eager to swarm the record with supposedly helpful documents that the witness has not seen.

Lastly, the concern that the listing requirement would be impracticable appears overblown. To the extent that documents are already referred to in a witness statement, there would be limited additional work involved in producing a list of documents that were used to refresh the witness' memory. This is because identifying the documents to elicit evidence from a witness is already part of the preparation process. In cases where the witness is also the client, the difficulty in identifying the relevant documents due to (for example) the client's direct involvement in engaging counsel is all the more reason why the process of listing the relevant documents should be managed carefully, irrespective of costs, because the client-witness' close familiarity with the dispute and the documents may pose a substantial risk on the value of the witness' testimony.[29]

In practice, the courts have applied the requirement in a measured and reasonable manner. In *Mansion Place*, O'Farrell J clarified that paragraph 3.2 of PD 57AC 'does not require the witness statement to list every document which the witness has looked at during the proceedings'.[30] In that case, the fact that there was no indication that documents not referred to have been used to refresh the witnesses' memories was immaterial because the key exchange in question was a telephone conversation, which could be tested during cross-examination. In another case, *Primavera Associates*, HHJ Paul Matthews stressed that the requirement does not apply indiscriminately, but only in relation to 'important disputed matters of fact'.[31]

III A PROPOSAL TO ASSIST WITH THE PROMOTION OF RELIABLE FACT WITNESS STATEMENTS

In this section, I set out a proposal that tribunals can adopt to improve the probative value of fact witness statements, inspired in part by the English court reforms, certain

27. *See Gestmin v. Credit Suisse* [2013] EWHC 3560 (Comm), para. 22, where Mr Justice Leggatt (as he then was) aptly observed that "[a]bove all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".
28. Implementation Report of the Witness Evidence Working Group (n 7) para. 47.
29. *Ibid.*, para. 54.
30. *Mansion Place Limited v. Fox Industrial Services Limited* [2021] EWHC 2747 (TCC), para. 59.
31. *Primavera Associates Ltd v. Hertsmere Borough Council* [2022] EWHC 1240 (Ch), para. 61.

of which had already been voiced (many years back) by eminent authorities in international arbitration.

1 Certification by Legal Representatives

One of the new requirements introduced in the English court reforms is that a witness must provide a 'confirmation of compliance' in terms set out in paragraph 4.1 of PD 57AC, which are as follows:

> I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.
>
> This witness statement sets out only my personal knowledge and recollection, in my own words.
>
> On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.
>
> I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.

Notably, the second paragraph is a departure from paragraph 18.1 of PD 32, which requires the witness statement to be in the witness' own words 'if practicable'.[32]

In addition to certification of compliance by the witness, the legal representative is required, under paragraph 4.3 of PD 57AC, to endorse the witness statement with a certificate of compliance, certifying that:

1. I am the relevant legal representative within the meaning of Practice Direction 57AC.
2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].
3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.

Notably, a legal representative is required to confirm that the witness statement has been prepared through a proper *procedure* (i.e., being satisfied that 'the purpose and proper content… have been discussed with and explained to …'), which presupposes that the legal representative will not play a substantial role in the *drafting* of the witness statement.

Are there any impediments to applying a similar requirement to fact witness statements in international arbitration? There have been calls, made as far as back in 2001 by the late V.V. Veeder QC, for legal representatives to provide a declaration

32. Practice Direction 32, para. 18.1.

'giving his or her name and professional qualification, and giving information about how, when and where the statement was prepared, including a statement of time spent by witness and representative respectively'.[33] Perhaps requiring the *witness* to certify that the witness statement is in his or her own words is a step too far, in the sense that in many cases, witnesses genuinely require assistance from counsel to prepare a statement that is logical, accurate and relevant, especially if the witness does not speak the language of the arbitration, which is common in cross-border disputes. However, there does not appear to be any good reason why legal representatives cannot explain the process of procuring the witness statement, because that is in fact the reality[34] and should therefore be subject to a requirement of transparency.

2 What Should Be the Subject of Certification by Legal Representatives?

It should be uncontroversial that the overriding objective is to ensure that the witness statement is as closest to the witness' own words as possible.[35] It should also be accepted that this objective can be achieved with or without counsel's assistance in the drafting process; but more often than not, there is good reason for counsel to guide the witness to produce the evidence that will assist the tribunal by, for instance, identifying the key issues and the order in which to address them (such as chronologically or by themes).

Then what are some of the procedural matters that could be the subject of certification by counsel? The following list draws inspiration from the ICC Report and is far from exhaustive, but is presented to facilitate a further discussion.

First, certification that adequate guidance was provided to the first interviewer of the witness (which would typically be in-house counsel), in line with the six principles outlined above. In particular, counsel should inform the first interviewers that:[36]

(a) the process of recollecting witnesses' memory should take place as early as possible after the experience of the relevant event. There is a firm body of scientific study that shows that the period of time that has elapsed between an experience and its recollection is one of the primary factors influencing the durability of human memory.[37] Thus, if recollection occurs long after the event, there is a higher risk of error in the memory being recalled. To be clear, however, we should avoid over-regulation by requiring counsel to disclose the precise duration between the experience and its recollection;
(b) leading questions should be avoided. Only neutral and open-ended questions should be put to the witness;

33. Veeder (n 4) pp. 223-224.
34. Report of the Witness Evidence Working Group, "Factual Evidence in Trials Before the Business & Property Courts", July 2019, para. 44(v).
35. Jane Jenkins, *International Construction Arbitration*, Arbitration in Context Series, vol. 1 (© Kluwer Law International, 3rd edn, Kluwer Law International 2021), p. 311.
36. ICC Report (n 12) para. 5.5.
37. Landau (n 5) p. 16.

(c) only contemporaneous documents the witness has authored or has personal knowledge of should be used as an aide-mémoire to facilitate the recollection process. But the witness must be instructed to recount their memory before providing them with documents. This is necessary to establish recollections that exist independently of the documents and those that rely on documents;
(d) interviews should be conducted individually, rather than as a group, as the latter can cause memory contamination;
(e) witness should be instructed to not discuss the matter amongst co-witnesses or colleagues involved in the dispute;
(f) the persons needed to conduct the interview should be limited to those who can most effectively elicit an honest response from the witness. For example, persons who have ulterior motives in obtaining a particular narrative because they themselves are personally vested in the dispute should not conduct the interview.

Second, certification that the legal representatives themselves have complied with the six principles. More specifically:[38]

(a) If counsel is the first responder who would interview the witness in question, counsel should be in a position to confirm that he or she has taken the steps that the first interviewer was expected to take (see above).
(b) If counsel is not the first interviewer, counsel should establish with the witness how much prior discussion and contact the witness has had with the first interviewer and other witnesses or personnel. This is necessary to establish whether the witness has potentially adopted a party-line prior to interviewing with counsel. Counsel should conduct a fresh interview, in whole or in part, if necessary.
(c) If counsel were to take a substantial role in the drafting process, counsel should avoid producing multiple drafts of fact witness statements and certify that he or she has exerted best efforts to achieve this goal. This is not only recommended in the Appendix to Practice Direction 57AC,[39] but also based on scientific findings that multiple drafts have proven to have an undue effect on memory.[40] The risk is especially acute if statements are drafted by a 'committee' (of co-witnesses and counsel, for example).
(d) If coordination is required amongst multiple witnesses, counsel should confirm that it has taken measures necessary to ensure that each witness' memory is not co-mingled, which can cause memory corruption. For example, one should avoid each witness reading the drafts of other witnesses and ensure each witness statement is prepared independently.[41]

38. ICC Report (n 12) paras 5.6-5.28.
39. Appendix to Practice Direction 57AC, para. 3.8.
40. ICC Report (n 12) para. 5.26.
41. *Ibid.*, para. 5.27.

IV CONCLUSIONS

It is trite that tribunals should be assisted by the parties and the evidence they present through a procedure that tribunals believe will produce the best evidence for arriving at the right result. But party autonomy, a defining feature that distinguishes arbitration from litigation, must inform discussions about the procedures the tribunal prefers to adopt. As noted in the explanation to Guideline IV.B, the duties of expert and fact witnesses to assist the tribunal and comply with its directions are to be 'collaborative' – witnesses should have a clear understanding of their roles and the purpose of their evidence early in the arbitration in order to perform their duties effectively.

We must be cautious not to adopt an entrenched view of a hierarchy of valuable evidence and instead, appreciate that witness evidence can be effective even if they are not produced to recall one's memory. Specifically, a fact witness statement may nevertheless be useful to set the scene of the dispute, explain the context to important documents, tell one's story at a more emotional or personal level, and provide technical explanations based on one's experience, education, and knowledge.[42]

However, the fact that there is no one-size-fits-all solution does not mean that lines in the sand cannot be drawn. There is (or should be) common ground on what every fact witness statement should contain and the procedures and tools that can be adopted by tribunals to promote probative witness evidence. As part of our obligation to assist the tribunal, when preparing fact witness statements, we should rid ourselves of our advocative tendencies and be more like a documentary photographer who strives for authenticity and clarity – to tell it as it is, not how it should be.

42. *Ibid.*, paras 4.13-4.26.